79967-9

No. 25217-5-III

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

FEATURE REALTY, INC, a Nevada corporation; MISSION SPRINGS, INC., a Washington corporation, now doing business as Canyon Construction NW, Inc., JACK KRYSTAL, as Trustee of the KM Family Trust; and RUSSELL V. LUGLI, individually and as Co-Trustee of the Lugli Family Trust, the Nikki Trust, and the Alpha Trust,

Appellants,

v.

PRESTON GATES & ELLIS, LLP; JERRY R. NEAL and JANE DOE NEAL, his wife, and the marital community comprised thereof;

Respondents,

And TERRENCE L. BUTLER and JANE DOE BUTLER, his wife, and the marital community comprised thereof,

Defendants in Trial Court.

APPELLANTS' REPLY BRIEF

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I. REPLY STATEMENT OF THE CASE

A. Respondents' Emotional Attacks on their Former Clients.

Respondents do not dispute Appellants' Statement of the Case. App. Br., pp. 6-14. Respondents instead resort to hypocritical emotional attacks on their long-time clients. See, CP 335-594. Respondents thus assail Feature for purportedly using "litigation as a business tool" [Resp. Br., p. 5 n. 2], even though Mr. Neal and Preston Gates & Ellis themselves represented Feature in the vast majority of the referenced litigation. *E.g.,* CP 611, 628, 701, 710-2, 796-99 ¶¶8-16. Respondents emphasize Feature's damage claims and settlements [Resp. Br., pp. 4-5), even though Mr. Neal himself signed the pleadings and administrative claims seeking those very damages. CP 708, 710-2. Respondents denominate their long-time clients as "California Developers," rather than by name, descriptor (*e.g.,* "Clients") or party designation [see, RAP 10.4(e)], transparently hoping that denomination will curry favor with this Court out of some xenophobic compulsion, even though Preston Gates & Ellis bills itself as having "1400 lawyers in 22 cities on *three continents*" [App. Mot. to Substitute, Appendix A] and took more than $140,000 in fees from these "California Developers." CP 594.

B. Statement of the Case Re: Statute of Limitations.

Respondents' recitation of "undisputed" facts is, at best, sloppy; at worst, misleading. Mr. Neal's own sworn, written testimony, establishes that he and Preston Gates & Ellis continued to *very actively* represent Feature in *all* the underlying matters until at least **March 14, 2002.** CP 795-99 (Mr. Neal Calif. Decl.) ¶¶8-16, 592, 613, 632 (Docket no. 178).[1]

Thus, when the Washington Supreme Court reinstated *Mission Springs v. City of Spokane* in April 1998, Feature naturally turned to their long-time counsel [*e.g.,* CP 335], Mr. Neal, to negotiate a settlement agreement with the City of Spokane and handle disputes arising out of that settlement agreement. CP 797-99 ¶¶9, 11-16; CP 324 (Complaint) ¶¶13, 14; CP 647 (Answer) ¶¶13, 14 (generally *admitting* Compl. ¶13, retention re: "the settlement agreement" and "a post-settlement dispute with the City").

By August 31, 1998, *Mr. Neal* had taken over as Feature's *lead* attorney in Feature's settlement negotiations with the City. CP 196 ¶4, 659, 667 ¶7, 662 ¶4, 795-6 ¶9. After the parties reached the agreement in October 1998, Feature relied on Mr. Neal to make certain that the "Settlement Agreement was properly approved in compliance with the Open Meetings

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1 Mr. Neal and Preston were not formally substituted out of E.D. Wash. Case no. 00-00444-AAM, until **April 24, 2002.** CP 632 (Docket entry 178).

Act." CP 681-2 (Interrog. no. 12), 693-4 (Interrog. no. 36), 667-8 ¶7.

Incredibly, Mr. Neal and Preston assert, *as undisputed fact*, that Feature "had ceased to depend or rely on Mr. Neal over two years earlier [than February, 2002]," *i.e.,* some time prior to February 2000. Resp. Br., pp. 6-7, 32-3 ("[N]o evidence [Feature] depended upon Preston after that date"). Respondents' assertion is preposterous, demonstrably false, and contradicted by Mr. Neal himself. CP 796-9 ¶¶8-16.

More accurately, Mr. Neal and Preston Gates & Ellis *continued* to actively represent Feature **after October 1998,** relative to implementation and enforcement of the Settlement Agreement. *E.g.,* CP 697, 699, 796-99 (Mr. Neal's Calif. Decl.) ¶¶11-16; CP 520, 529, 532, 535, 538, 541, 550. When the City breached the Settlement Agreement, Feature, *represented by Mr. Neal and Preston*, filed a complaint **on November 28, 2000** to enforce it. CP 701, 796 ¶11. Mr. Neal's continued representation of Feature, long after the relatively minor disagreements between the parties in 2000 (Resp. Br., pp. 6-7, 32-34), shows that Mr. Neal, Mr. Morley, and the clients overcame those disagreements and moved forward with Mr. Neal's continued representation of Feature.[2] Indeed, concerning his April 12, 2000, letter to Mr. Braff (Resp.

2 Respondents state "as of April 12, 2000, Feature was preparing to replace" Mr. Neal as lead counsel." Feature, however, *did not replace* Mr. Neal as either counsel or "lead"

Br., pp. 6-7, 32-3), Mr. Morley testified (CP 1049, p. 168:14-8):

> A: Once Jerry and I established--we had a *little tussle over this, as I recall.* There was a little sparring that occurred, *but once that happened, I don't think I could have had a finer working relationship than I had with him* [*i.e.,* Mr. Neal], *but initially* that was very hard to come by. [Emphasis added].

Thus, after the City of Spokane removed the case to federal court [CP 628, 642-3, 796 ¶11], Mr. Neal and Preston *continued* to represent Feature in both State and Federal proceedings related to validity and enforcement of the Settlement Agreement, and reinstatement of Feature's underlying lawsuit against the City. CP 550, 553, 557, 561, 565, 572-3, 578-9, 611 (9/20/01 Docket entry), 632 and 634 (Docket nos. 151, 178), 796-99 ¶¶11-16.

In the meantime, the City's December 5, 2000 Answer had for the first time questioned the validity of the Settlement Agreement based on the Open Public Meetings Act. CP 662-3 ¶5.[3] Only *after* the City raised the

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counsel, as Mr. Neal's November 28, 2000 filing of the complaint demonstrates. CP 797-99 ¶¶14-16, 860 ¶2, 1049 (p. 168:2-18), 1122:3-8. See further, CP 532, 535, 538, 541, 544, 547, 550, 553, 557-8, 561, 565, 569, 572-3, 578-80, 583-4, 588-89, 592 (time records).

3 Respondents assert that "[n]o one could have undone the failure to have the 1998 Settlement approved in an open meeting." Resp. Br., p. 45. At least three *facts* contradict Mr. Neal's 20/20 hindsight assertion: (1) the clients did not know the settlement had not been properly approved (CP 693-4, 1046-48); (2) *Mr. Neal, at that time,* did not view the validity of the Settlement Agreement as indefensible, as shown by the pleadings he filed (CP 166-7 ¶7), and ; (3) *if* Mr. Neal knew Feature could not possibly win the lawsuit over the validity of the Settlement Agreement, or otherwise remedy the error, then he had an affirmative duty under RPC 1.4 to so advise Feature; he instead told Feature the City was wrong. (CP 166 ¶6, 857 ¶5).

issue in its Answer did Mr. Morley and Mr. Neal begin "digging into what had occurred...The process was a long time and very difficult in doing, and there were huge communications related to factual development..." CP 1046, pp. 45:17-46:14. See further, CP 1047-8, pp. 63:20-68:1 (detailing the necessary investigation). **Feature, therefore, did not learn "until mid-2001** [*i.e.,* less than three years after Feature filed the complaint] during depositions of the City Clerk and present or former City Council people...that the only approval ever given the Settlement Agreement was done in Executive Session." CP 693-4 (Ans. to Interrog. no. 36). Mr. Morley's deposition testimony confirms Feature's statement. CP 1047-8, pp. 63:20-68:1 (Morley: "It was **not** clear from the outset" whether the City had approved the Settlement Agreement in an open public meeting).

After the federal court granted the City's motion for summary judgment, Mr. Morley sent an email to Messrs. Lugli and Krystal on **August 31, 2001**, raising "a question as to *whether* you want to look at the issue of malpractice that involves Terry Butler and Jerry Neal." CP 703. (Respondents also rely on this email [*e.g.,* Resp. Br., p. 8 n. 3], but omit mention that it was sent ***less than*** **three years prior to the March 2, 2004, filing of this complaint.** This email, therefore, was too late to constitute the

event triggering the statute of limitations).

Even so, Feature did *not* retain counsel or otherwise pursue the potential claim against Mr. Neal at that time; instead, Mr. Neal and Preston, Gates & Ellis *continued* to very actively represent Feature. *E.g.,* CP 633-5, 710-2, 797-9 ¶¶14-16. Mr. Neal and Preston also *continued* to represent Feature relative to the validity and enforcement of the Settlement Agreement, even after the federal court declared the Settlement Agreement void on **October 30, 2001**, by filing: (1) the appeal of the federal court judgment; (2) an administrative claim; and (3) actively litigating the underlying State Court proceeding. *E.g.,* CP 325 ¶17 and 647, 588, 592, 633-4 (Docket entry nos. 147 and 153), 705, 708, 710-12 (**11/29/01** administrative claim signed by Mr. Neal), 714, 797-99 (Mr. Neal's Calif. Decl.) ¶14-16. While those efforts continued, Appellant Jack Krystal met with Mr. Neal on **January 7, 2002** and asked Mr. Neal to persuade the City to approve the Settlement Agreement (to moot the federal court case). CP 857 ¶¶4-5. Mr. Neal agreed "he would contact Pat Dalton at the city attorney's office to discuss it." *Id.* CP 857 ¶¶4-5. Rather than proceed as promised, Mr. Neal instead sent a **January 23, 2002,** letter to client/Appellant Rusty Lugli, informing Mr. Lugli that Preston had conflicts of interest arising out of Preston's representation of

the City of Spokane and asking Feature to waive those conflicts of interest. CP 714-5. Only after Feature refused to waive Preston's conflicts of interest, were Mr. Neal and Preston substituted out as counsel, on **April 24, 2002.** CP 331 (Preston's Ans. to Interrog. no. 16), 592, 613, 632, 796-99 ¶¶8-16.

Respondents are thus mistaken when they assert, as "undisputed fact," that by **February 2000,** Feature no longer relied on Mr. Neal. Respondents are similarly mistaken when they further assert as *undisputed fact* that "by December 2000...[Feature] had retained Blaine Morley as **lead** counsel." Resp. Br., p. 33(emphasis added).[4] Beyond the foregoing evidence, **Neal** and Morley *both* testified that they worked together, jointly, on these inter-related matters throughout 2000 and 2001. CP 797-99 ¶¶14-16, 860 ¶2, 1122:3-8.

The trial court thus concluded that genuine issues of fact remained concerning application of the continuous representation rule. RP 66-7.

II. ARGUMENT

A. Feature Did Not "Obtain" a Voluntary and Unilateral Dismissal of the California Case.

1. Respondents Concede the Trial Court Erred in Its Application of California Law.

Feature's Opening Brief painstakingly explained why the California

4 Respondents rely on this negative inference as the sole basis for distinguishing the case law with which they disagree. Resp. Br., p. 40 n. 6, 42. See discussion, *infra,* pp.17-22.

trial court's January 28, 2003 order, quashing service on Mr. Neal for lack of jurisdiction and staying proceedings against Preston Gates & Ellis on grounds of *forum non conveniens*, had **permanently and involuntarily prohibited Feature from proceeding against either Neal or Preston** long before the July 29, 2003 notice of dismissal. App. Br., pp. 24-30. Respondents concede Feature's analyses and legal conclusions. Resp. Br., pp. 25-7, 29 ("beside the point"). Feature also showed how the trial court relied upon its erroneous analysis of California law governing these issues. App. Br., pp. 13, 24, *quoting,* RP 63-4. Respondents concede this conclusion as well.

Although Respondents say "[w]hat matters is what actually occurred," they nevertheless insist that the Court must ignore *what actually occurred* because it "is beside the point." Resp. Br., pp. 25, 29. What "actually occurred," *as a matter of law,* is that the California court involuntarily prohibited Feature from proceeding with its lawsuit against Mr. Neal on January 28, 2003. By quashing service on Mr. Neal for lack of jurisdiction, the California Court prohibited Feature from *ever* suing Mr. Neal in California. It was *not* a voluntary or unilateral dismissal, as a matter of law. What also "actually occurred," *as a matter of law,* is that the California court involuntarily and *permanently* stayed Feature's lawsuit against Preston Gates

& Ellis on January 28, 2003. That final order likewise prohibited Feature from *ever* suing Preston in California. It was *not* a voluntary or unilateral dismissal. The issue, then, is whether the two dismissal rule *requires* this Court to ignore the California Court orders, obtained by Mr. Neal and Preston, which *prohibited* Feature from proceeding against them.

2. *Feature Agrees a "Bright Line" Rule Applies: A Dismissal is Not Obtained Unilaterally, for Purposes of the Two Dismissal Rule, If the Court Previously Determined, on Defendants' Motions, that the Court Lacked, or Declined Jurisdiction, Thus Preventing the Plaintiff from Going Forward.*

How does this Court fulfill the purpose of the two dismissal rule by overlooking the objective, indisputable fact that the California Court had determined it lacked or would decline jurisdiction, *on defendants' motions,* and forever prohibited Feature from proceeding against either Mr. Neal or Preston in California? Respondents do not answer this fundamental question, except through rote recitation of their interpretation of the two dismissal rule.

In contrast, Feature *agrees* that *Specialty Auto* imposes a "bright line" rule that prohibits Washington courts from considering "the plaintiff's reasons or motives." Resp. Br., p. 16. Feature further *agrees* that the two dismissal rule applies to a dismissal unilaterally "obtained" by the plaintiff. *Spokane County v. Specialty Auto*, 153 Wn.2d 238, 246, 103 P.3d 792

(2004). These agreements, however, do not answer the narrower issue posed in this case, *i.e.,* does a plaintiff unilaterally "obtain" a dismissal *if* the defendant had *first* "obtained" an order that declined jurisdiction and prohibited the plaintiff from proceeding? Feature thus urges a narrow and reasonable "bright line" application of CR 41(a)(4), entirely consistent with *Specialty Auto*: a plaintiff does not "obtain" a dismissal for purposes of the "two dismissal" rule if *indisputable, objective* evidence shows that the Court had previously entered a final order, on the defendants' motion, that recognized the absence of, and/or declined, jurisdiction and prevented the plaintiff from proceeding. App. Br., 28-35. Feature's position is entirely consistent with the purposes and narrow construction of CR 41(a)(4); Respondents' position is not. App. Br., pp. 17-24. Indeed, **Respondents do not cite *any* case from *any* jurisdiction, which imposes the two dismissal rule based upon a dismissal *after* a Court order, on defendant's motion, quashing service, staying the proceedings, or otherwise prohibiting the plaintiff from proceeding.** See, *Murray v. Conseco, Inc.,* 467 F.3d 602, 604-5 (7th Cir. 2006)("notice of consent to dismiss," conceding lack of jurisdiction, was "no voluntary dismissal").[5] Instead, *after* a Court (as

5 The majority in *Sutton Place Development Co. v. Abacus Mtg. Investment Co.,* 826 F.2d 637 (7th Cir. 1987)(Resp. Br., p. 23; App. Br., pp.) relied on the "underlying policy"

occurred here vis-à-vis Neal and Preston) has determined that it does not have jurisdiction, **that Court thereafter may do nothing other than enter an order of dismissal.** *E.g., Inland Foundry Co., Inc. v. Spokane County Air Pollution Control Auth.*, 98 Wn. App. 121, 123-4, 989 P.2d 102 (2000); *Howlett v. Weslo, Inc.*, 90 Wn. App. 365, 367-8, 951 P.2d 102 (2000). The July 29, 2003 notice of dismissal was therefore *entirely superfluous as to Mr. Neal, over whom the California Court had no jurisdiction, and Preston Gates & Ellis, over which the California Court had declined jurisdiction.*

Respondents did not just *plead* an affirmative defense in the California case; Respondents did not just sign an "approved as to form" dismissal of the California case; and Respondents did not just "cajole" Feature into dismissing the California case. See, Resp. Br., pp. 13-20. Instead, over Feature's objections, Respondents sought and obtained California Court *orders* that conclusively prevented Feature from proceeding.[6] The *indisputable, objective* evidence thus shows that

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of the two dismissal rule because the plaintiff had actually filed a notice of dismissal mislabeled as a "motion, "rendering the "order" superfluous. 826 F.2d at 641-3.

6 *Respondents* urge this Court to *speculate* that Feature had an "option" because perhaps *Respondents might* have signed a stipulation to dismiss the California case, or that Feature might have filed a *motion* to dismiss the California case (Resp. Br., p. 26); however, the California Court had *permanently* stayed the case against Preston and quashed service on Neal. This Court should not speculate that Feature had another "option" available, when the undisputed facts show that it did not. See, App. Br., pp. 33-4.

Respondents had already prevented Feature proceeding with the California case, long before Feature filed the notice of dismissal.

3. The Court Should Ignore Respondents' Scare Tactics.

Respondents argue that any other result would create "issues for trial" and require "[t]estimony as to what the lawyers thought and what the California court believed or communicated would be required." Resp. Br., p. 18. This is nonsense. Respondents do not dispute either the substance or effect of the California Court orders. Thus, Feature's position neither requires *nor* permits subjective testimony because the California Court orders do not require trial or live testimony. ER 902(d). Respondents are thus mistaken when they assert that Feature would force "unnecessary and speculative inquiry into motives and states of mind." Resp. Br., p. 18.

4. Respondents Stand CR 41(a)(4) on its Head: the Voluntary King County Dismissal has No Bearing on Whether the Involuntary California Dismissal Counts Toward the Two Dismissal Rule.

Mr. Neal and Preston also urge this Court to ignore the objective, indisputable evidence of the California Court Orders because, they say, Feature had a chance to "get it right" by not dismissing the King County case. Resp. Br., pp. 11-2, 27, quoting RP 65. Respondents stand the two dismissal

rule on its head, arguing in essence that *if* the *second* dismissal is voluntary, then any doubt as to whether the first dismissal was also voluntary should be resolved against the plaintiff. Their reasoning is backwards. Washington courts are supposed to construe the two dismissal rule "narrowly" to "promote resolution on the merits." App. Br., pp. 19-20. Thus, the Court must resolve any doubt whether *Feature* "obtained" the California dismissal voluntarily and unilaterally *in favor of,* and certainly not against, Feature.

5. *Privity Does Not Save Mr. Neal; Respondents Do Not Dispute Appellants' Position.*

In the trial court, Mr. Neal argued that he too should reap the benefit of the July 29, 2003 notice of dismissal, based on "*res judicata* and privity." CP 914-6. Feature explained why *res judicata* and privity do not apply against a plaintiff who could *not* proceed in the first suit against the party who claims privity and *res judicata* in the second lawsuit. App. Br., pp. 35-40. See further, *Burley v. Johnson,* 33 Wn. App. 629, 658 P.2d 8 (1983)(strict privity did not apply re: two dismissal rule, where plaintiff did not *control* dismissal of the first two lawsuits). Respondents do *not* discuss these specific limitations on *res judicata* and privity at all, simply reciting the *general* rule that Mr. Neal and Preston would normally be considered in

privity. Resp. Br., pp. 30-1. The *general* rule, however, is *not* the issue here.

Unable to defend his previous position, Mr. Neal instead urges the Court to apply CR 41(a)(4) broadly so that dismissal of a "claim" accrues to the benefit of all parties in privity—even those against whom the plaintiff *could not proceed* in the first court. Resp. Br., pp. 29-30. Respondents do not cite a single case to support their argument; indeed, narrow construction of the two dismissal rule limits its application to those entitled to dismissal based upon *res judicata,* as if the dismissed case had been resolved on the merits. App. Br., pp. 35-40. Because the California Court had already conclusively determined that Feature could not proceed against Mr. Neal in California, he may not claim the benefit of the July 29, 2003 notice.

6. *Estoppel Bars Respondents from Asserting the Two Dismissal Rule.*

Respondents having successfully persuaded the California Court to prohibit Feature from proceeding against them in California case, estoppel bars them from arguing that Feature voluntarily and unilaterally "obtained" the California dismissal. App. Br., pp. 40-42. Respondents nevertheless insist that this Court ignore the results of their actions in the California Court. Respondents thus equate this situation, in which Neal and Preston had

persuaded the California Court to enter orders which forever prohibited Feature from proceeding there, with the substantially different circumstances posed by defense counsel's mere "approvals as to form" on dismissals in *Guillen v. Pierce County,* 127 Wn. App. 278, 110 P.3d 1184 (2005). Resp. Br., p. 20. The two situations are not remotely comparable.

Estoppel thus bars them from now asserting that Feature voluntarily and unilaterally "obtained" the California dismissal. See, App. Br., pp. 40-2.

B. Genuine Issues of Fact Prevent Summary Judgment on Continuous Representation.

1. Respondents had to Prove that No Genuine Issue of Fact Remained on their Statute of Limitations Defense.

Respondents, as the parties moving for summary judgment, had the burden to show that no genuine issue of material fact remained on their statute of limitations affirmative defense. CR 8(c); *Young v. Key Pharmaceuticals,* 112 Wn.2d 216, 225, 770 P.2d 182 (1989). The court "must view all facts and reasonable inferences in the light most favorable to the non-moving party" and "[w]here competing inferences may be drawn from the evidence, the issue must be resolved by the trier of fact." *Versuslaw, Inc. v. Stoel Rives, LLP,* 127 Wn. App. 309, 328-9, 111 P.3d 866 (2005).

This summary judgment maxim has particular importance here. For example, substantial evidence supports the inference that Feature *did* indeed continue to "rely" and "depend" upon Mr. Neal and Preston Gates & Ellis, at least until January, 2002, *i.e.,* well within the statute of limitations. See, Statement of the Case, *supra,* pp. 2-7. The Court must therefore draw this particular inference *in favor of Feature.* When properly drawn, the fundamental premise of Respondents' statute of limitations argument fails, *regardless of the Respondents' legal theory.*

Indeed, far from being "unsure how to apply the 'continuous representation'" rule [Resp. Br., p. 33], the trial court correctly recognized that the parties had overcome whatever disagreements had occurred at moments during 2000. RP 66-7. See, Statement of the Case, *supra,* pp. 3-4 and n. 2. The trial court thus *correctly* explained that genuine issues of fact remained as to "what occurs over the next two years [after Spring, 2000]," during the course of Mr. Neal's extensive, continuing representation until 2002. RP 66-7.[7]

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7 The trial court focused on *precisely* the factual issues urged by Respondents here (*i.e.,* whether Feature "relied" or "depended" on Neal/Preston after 2000). Respondents are therefore mistaken when they assert that "[t]he trial court identifies no specific limitations-related facts that were in dispute." Resp. Br., p. 33. Nevertheless, summary judgment findings of fact are also "superfluous" and will not be considered on appeal. *E.g., Telford v. Thurston County Bd. of Comm'rs,* 95 Wn. App. 149, 157, 974 P.2d 886 (1999).

2. *The Continuous Representation Rule Tolled the Statute of Limitations; Case Law Rejects Respondents' Slippery Slope "Loss of Confidence" Theory.*

When an attorney continues to represent the attorney's client in an attempt to absolve himself of liability or mitigate damages caused by the attorney's malpractice, the continuous representation rule tolls the statute of limitations to allow and encourage that attempt.[8] *Janicki Logging & Construction Co. v. Schwabe, Williamson & Wyatt, P.C.*, 109 Wn. App. 655, 37 P.3d 309 (2001) thus held that the continuous representation rule tolls the statute of limitations on a client's legal malpractice claim against an attorney in such circumstances, ***even after the client knows of the attorney's malpractice.*** The court dismissed the underlying case in 1992. Not unlike the roles of Mr. Neal and Preston in the Federal Court litigation here, the attorneys in *Janicki Logging* continued to represent the clients through appeals of the underlying matter, until 1997. The *Janicki* Court recognized that *if only the discovery rule* tolls the statute of limitations on legal

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8 Curiously, Respondents argue that the continuous representation rule did not apply because, they say, "it was too late for remediation." Resp. Br., pp. 44-6. Respondents are obviously mistaken based upon the *facts* explained in n. 3, *supra.* Indeed, Respondents do not (and cannot) state the date during Mr. Neal's representation when they say remediation became "too late." CP 796-9 (Neal Decl.) ¶¶8-16. *Cawdrey v. Hanson Baker Ludlow Drumheller, P.S.* 129 Wn. App. 810, 120 P.3d 605 (2005) and *Burns v. McClinton,* 135 Wn. App. 285, 143 P.3d 630 (2006), cited by Respondents (Br., p. 44), are thus inapposite.

malpractice claims, then the statute of limitations on the client's claim had long before expired because the client was charged with knowledge of the malpractice in 1992 when the claim was first dismissed. *Id.*, 109 Wn. App. at 659-660. The Court thus expressly recognized that the continuous representation rule applies **"even if the client has knowledge of the facts supporting the claim."** *Id.*, at 662 (emphasis added). The Court's rationale resonates with substantial force here (109 Wn. App. 662):

> The continuous representation rule avoids disruption of the attorney-client relationship and gives attorneys the chance to remedy mistakes before being sued. The rule also prevents an attorney from defeating a malpractice claim by continuing representation until the statute of limitations has expired. . . "The attorney client relationship is maintained and speculative malpractice litigation is avoided."

Quoting, 3 Mallen & Smith, *Legal Malpractice* §22.13, p. 431 (5th ed. 2000), the *Janicki Logging* Court explained further (109 Wn. App. at 663):

> The continuous representation rule is...appropriate in those jurisdictions adopting the...discovery rule [.] The policy reasons are as compelling for allowing an attorney to continue efforts to remedy a bad result...**even if the client is fully aware of the attorney's error.** The doctrine is fair to all concerned parties. **The attorney has the opportunity to remedy, avoid or establish that there was no error or attempt to mitigate damages. The client is not forced to end the relationship, *though the option exists.*** This result is consistent with all expressed policy bases for the statute of limitations. [Emphasis added].[9]

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9 Respondents cite *Cantu v. St. Paul Companies*, 401 Mass. 53, 514 N.E.2d 666 (1987) for the proposition that tolling under the continuous representation rule ended "when [the client] no longer reposes exclusive trust or confidence in the attorney." Resp. Br., pp. 37-8.

No dispute exists but that Mr. Neal and Preston continued to represent Feature in the underlying matters until **January, 2002** - less than *two* years, *not three*, prior to filing of the instant complaint. See Statement of the Case, *supra,* pp. 2-7. Mr. Neal and Preston tried to either salvage the Settlement Agreement or at least mitigate the damages caused by Mr. Neal's malpractice. Mr. Neal himself explained to the California Court that his representation included *all* of the underlying matters, including defending the validity of Settlement Agreement, appealing the adverse Court ruling, reopening the *Mission Springs* litigation, and pursuing administrative claims. CP 796-9.

Consistent with the policies enunciated in *Janicki,* the courts and commentators reject Respondents' suggestion that the statute of limitations should start to run when the client "loses confidence" in the attorney *because such an analysis establishes* "**too subjective and uncertain a standard**" and "**creates a slippery-slope of convoluted reasoning almost impossible to define.**" 2 Mallen & Smith, *Legal Malpractice* §22.13, pp. 1458-1459 (2005 ed.)(emphasis added)(*citing, DeLeo v. Nusbaum,* 263 Conn. 588, 821 A.2d 744 (2003) and *quoting*, *Williams v. Maulis,* 2003 S. Dak. 138, 672 N.W.2d

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Massachusetts, however, does *not* recognize the continuous representation rule *once the client knows of the attorney's malpractice.* 2 Mallen & Smith, *Legal Malpractice* §22.13, p. 1453 and n. 39 (2005 ed.). *Cantu* thus conflicts with *Janicki.*

702 (2003). Otherwise "[e]very malpractice trial would begin with a search for that point in the relationship when it went sour, whereupon we would then re-visit the statute of limitations." *Maulis, supra,* 672 N.W.2d at 707 (emphasis added). Thus, "**[i]f actual representation continues, the client's suspicions or belief of malpractice ordinarily does not end tolling.**" *2 Mallen & Smith, supra,* §22.13, p. 1460 (emphasis added).

Continuous representation thus tolls the statute of limitations at least until the clients actually take *concrete steps* to unequivocally assume an adversarial position to the attorney, *e.g.,* by actually retaining counsel to investigate suing the attorney (something Feature did not do here). *DeLeo v. Nusbaum, supra,* explains this process in terms of "either a formal or the de facto termination of the attorney-client relationship" (821 A.2d at 750):

> A de facto termination occurs if the client takes a step that **unequivocally** indicates that he has ceased relying on his attorney's professional judgment in protecting his legal interests, such as hiring a second attorney to consider a possible malpractice claim or filing a grievance against the attorney...A client **who has taken such a concrete step** may not invoke this doctrine..." [Emphasis added].

Morrison v. Watkins, 20 Kan. App.2d 411, 889 P.2d 140 (1995) illustrates these principles (889 P.2d at 420-21):

> Where the client does hire another attorney, *and assumes an adversarial stance to her first attorney,* the continuous representation rule terminates, even if the client does not formally fire the first

> attorney...In this case, Morrison was not obliged to hire counsel to look at the investments made by Watkins and Adams. She decided to do so, however, and was advised by her independent counsel that she should fire Watkins and Adams. **However, she chose not to do this and attempted to work with them to mitigate damages and correct their mistakes.** ***Because she never assumed an adversarial stance against Watkins and Adams, the continuous representation rule applies*** and Morrison's cause of action *accrues* from the time that she *dismissed* Watkins and Adams. [Emphasis added].

Consistent with these authorities, retention of *other counsel including co-counsel* (not replacement counsel) to work *with, not adversely to* the offending attorney, does *not* interrupt tolling under the continuous representation rule. 2 Mallen & Smith, *supra,* pp. 1460.[10] See further, *e.g., Williams v. Maulis, supra,* 672 N.W.2d at 706, 707; *Maddox v. Burlingame,* 205 Mich. App. 446, 517 N.W.2d 816, 818 (Mich. App. 1994)(co-counsel "*not consulted in place of,* but *in addition to,* defendant"); *Bass & Ullman v. Chanes,* 185 A.D. 750, 586 N.Y.S.2d 610, 610-11 (1992)(retention of independent counsel did not stop tolling).[11] Respondents thus misstate the

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10 Respondents cite (Br., pp. 38, 40) *Dixon v. Shafton,* 649 S.W.2d 435 (Mo. 1983), in which the statute of limitations commenced running only *after* the attorney advised the clients of his mistake *and* the clients retained independent counsel *to pursue the malpractice claim. Id.,* at 438. Similarly, in *Hendrick v. ABC Ins. Co.,* 787 So.2d 283, 293 (La. 2001) apparently decided after trial on the merits, a second attorney, not co-counsel, specifically advised the clients that they had a legal malpractice claim against the defendant attorneys. No such facts are present here until at least **August 31, 2001**--less than three years before Feature filed this complaint. See, Statement of the Case, *supra,* pp. 2-7.

11 Respondents cite *Aaron v. Roemer, Wallens & Mineaux, LLP,* 272 A.D.2d 752, 707 N.Y.S.2d 711 (2000) for the proposition that the continuous representation applies only "if

law by their sweeping assertion that "[t]he 'continuous representation' exception does not apply where the client retains other and independent counsel." Resp. Br., p. 37. Accordingly, the mere fact that Feature retained Mr. Morley in March, 2000, as co-counsel to work *with* Mr. Neal, did not stop tolling under the continuous representation rule.

Moreover, the very first *hint* that an "adversarial" relationship *might potentially* develop between Feature and Neal/Preston did not occur until **August 31, 2001 - *less than three years prior to the filing of this complaint.*** CP 703. See further, Statement of the Case, *supra,* pp. 3-4. Even then, however, Feature did *not* take any concrete step to either terminate their relationship with Preston/Neal, or to retain other counsel to pursue a malpractice claim, until after Preston and Neal withdrew in 2002.

Consistent with the central purpose of *Janicki*, Preston and Mr. Neal continued to represent Feature until 2002, to fix or mitigate the problem created by their malpractice. Thus, under any recognized legal theory, genuine issues of fact remain concerning the continuous representation rule.

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the client has an ongoing, dependent relationship to the negligent attorney." Resp. Br., p. 37. *Aaron,* however, held that tolling did not stop until *after* the *attorney moved to withdraw, and the client filed a complaint against the attorney with the court* stating "he did not feel he 'would be able to mend this now fractured relationship," and scheduled a meeting to "finalize" termination of their relationship. *Id.,* 707 N.Y.S.2d at 713. *LukLamellen U. Kupplungbau GmbH v. Lerner,* 166 A.D.2d 505, 560 N.Y.S.2d 787 (1990) (Resp. Br., p. 38) recites the New York rule *but held that the continuous representation rule tolled the statute.*

C. Genuine Issues of Fact Remain Concerning Application of the Discovery Rule.

Genuine issues of material fact also remain relative to application of the discovery rule. See, *Winbun v. Moore,* 143 Wn.2d, 206, 213, 18 P.3d 576 (2001)(whether "plaintiff discovered or through the exercise of reasonable diligence should have discovered..." is a fact question for the jury).

Respondents argue that mere filing of the City's Answer in December 2000 placed Feature on notice of Feature's potential legal malpractice claim against Mr. Neal and Preston. Resp. Br., pp. 35. In this particular case, Feature's Settlement Agreement with the City was eventually determined invalid, but not until October 30, 2001 - *less than three years prior to filing of the complaint.* For purposes of accrual, the client's cause of action generally does not *accrue* until the adverse judgment is entered in the trial court, rejecting the client's position. *Richardson v. Denend,* 59 Wn. App. 92, 98, 795 P.2d 1192 (1990), *cited with approval, Janicki Logging,* 109 Wn. App. at 659. Prior to that time, whether the client actually has a cause of action for legal malpractice remains entirely speculative and premature; thus, resort to the courts imposes an unnecessary burden on both parties and courts.

Respondents nevertheless argue that Mr. Morley (in a joint meeting

with Mr. Neal, on an unspecified date *after* December 5, 2000) told Feature "they were exposed because the 1998 Settlement *could be void.*" Resp. Br., p. 36 (emphasis added). What Feature did not know at that time, however, is that *Mr. Neal* had done anything wrong. Mr. Morley, in his deposition, instead explained that he and Mr. Neal began "digging into what had occurred" only *after* the City filed its Answer, and "[i]t was not clear from the outset" whether the Settlement Agreement had been approved in an open meeting. CP 1046-8, pp. 45:17-46:14, 63:20-68:1. Feature thus did not learn until "mid-2001 during depositions of the City Clerk and present or former City Council people...that the only approval ever given the Settlement Agreement was done in Executive Session." CP 693-4. Only *after* this investigation in which Mr. Neal participated, did Mr. Morley raise the possibility of a legal malpractice claim to Feature on August 31, 2001.

Just as in *Winbun,* the issue of whether Feature should reasonably have discovered the basis for its legal malpractice claims against Mr. Neal and Preston presents an issue of fact for the jury to decide. Moreover, prior to the Federal Court judgment on October 30, 2001, Feature would not have had to file a legal malpractice claim at all, *if* it prevailed in the Federal

lawsuit.[12] Respondents' theory would thus have the unfortunate effect of forcing clients to file legal malpractice actions prematurely, even before the client could determine whether the attorney's malpractice could be cured. This result would disserve both clients *and* attorneys. Genuine issues of fact thus also remain concerning application of the discovery rule.

III. CONCLUSION

Feature did not violate the two dismissal rule, and genuine issues of fact exist concerning the statute of limitations defense. The Court should therefore reverse the trial court judgment and reinstate Feature's complaint.

DATED this 18th day of January, 2007.

LAW OFFICES OF ROBERT B. GOULD

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12 Citing *Huff v. Roach,* 125 Wn. App. 724, 106 P.3d 268 (2005), Respondents argue that "[t]he Court of Appeals has rejected a rule that would allow plaintiffs to extend the limitations period indefinitely by filing time-barred actions and waiting until the underlying case is dismissed before filing for malpractice." (Resp. Br., pp. 46-7). Feature makes no such argument here. The clients in *Huff* retained *replacement counsel* in 1995, *after the statute of limitations* on the underlying claim *had already expired* but the lawsuit had not been dismissed. The clients waited *seven years* to file their legal malpractice complaint. The Court held that the clients "were not diligent in pursuing their rights. They knew the facts underlying their malpractice claim as early as June 24, 1995, nearly seven years before filing suit, well within the three year statute of limitations." *Id.* 125 Wn. App. at 731. No such similar situation is present here. See Statement of the Case, *supra,* pp. 2-7 and nn. 3, 8.